SUPREME COURT, U. S.

Supreme Court of The United States

October Term, 1968

No. 753

LYNN PORTER, *Petitioner*

against

STATE OF SOUTH CAROLINA, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

This action originated in Greenville County, South Carolina. During the latter part of August, 1965, Mr. Ted Owens, an officer of the South Carolina Law Enforcement Division, was assigned to investigate reported gambling activities in Greenville County. The officer obtained a telephone number through which, reportedly, wagers or bets on baseball and football games could be placed. This number was not listed in the name of the defendant. On October 14, 1965, the officer called the telephone number and an individual who gave his name as Lynn Porter, the defendant, answered. The officer attempted to make a bet with the defendant. The defendant said he would have to call him back. The defendant called the officer and a bet was placed with the requirement that the money be left at the motel desk where the officer was staying so that it could be picked up by the one taking the bet. The officer made bets with this same person in this way

at least once each week from September 14, 1965 until the defendant was arrested on December 31, 1965. The last tele - phone conversation by the officer to this party was approximately fifteen (15) or twenty (20) minutes before the defendant's arrest. The officer had never seen the defendant until the arrest but, from a comparison of the telephone voice with that of the defendant in person, he testified at the trial that the telephone voice was that of the defendant, Lynn Porter.

The defendant was arrested on December 31, 1965, at his residence. When the officers arrived, his wife first came to the door but went back into the house without letting the officers in. In response to a second knock, the defendant then came to the door and inquired as to whether the officers had a search warrant. Upon being told that the officers did not have a search warrant but did have an arrest warrant, the defendant unlocked the door and the officers entered the house. After the arrest warrant was read to the defendant, he was told that the officers "wanted to look around", to which he replied, "Go ahead" or "Help yourself". The house, including the basement, was then immediately searched for gambling paraphernalia. In one of the basement rooms, described as a den or play room, there was located a telephone with four (4) or five (5) incoming lines operated by pushbuttons. In addition, there was found in the basement rooms basketball, baseball and football parlay cards, dice, playing cards and books showing figures and scores of basketball and football games. During this search one of the officers requested that the defendant's wife turn over to him money in her handbag, which she did. This was "marked money" used in placing one of the bets and was introduced at the trial.

At the trial, the Petitioner offered no testimony or evidence in his behalf and was found guilty. An Appeal was taken to the South Carolina Supreme Court on the questions presented herein and the conviction was affirmed and rehearing was denied.

QUESTIONS INVOLVED

I

Whether due process of law and the right to be secure against unreasonable search and seizures, as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution was denied petitioner by the receipt as evidence of various alleged gambling paraphernalia obtained from petitioner's residence by police officers without his consent or permission and without having in their possession a Search Warrant.

II

Whether due process of law, guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution was denied petitioner by receipt as evidence against him of statements allegedly made by the petitioner at the time of his arrest, when it was admitted by the State that the arresting officers, at no time advised petitioner of his right to remain silent and/or to have present an attorney.

III

Whether due process of law, as guaranteed by the Fourteenth Amendment was denied petitioner by the failure of the Trial Court to charge the law relative to "entrapment" when there was evidence before the jury and the Court that there had been an entrapment of the petitioner by the police officers.

ARGUMENT

I

The Petitioner Was Denied Due Process of Law, Guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States, by the Receipt As Evidence of Various Alleged Gambling Paraphernalia, Seized from The Petitioner's Residence by Police Officers Without His Consent or Permission and Without the Existence or Possession of a Search Warrant.

The State of South Carolina strongly urges that the incriminating evidence was lawfully obtained from the defendant's residence. First, there was a valid consent to a search of the residence and, secondly, the officers made a valid search incident to a lawful arrest.

Although the petitioner has totally ignored the second ground, he contends that he was not advised of his constitutional rights and that the testimony as to his consent was simply not true. This is in spite of the fact that three (3) dedicated officers of the law swore that he did give his consent and their testimony was uncontradicted.

The only attack that the petitioner has made upon the State's right in this case to make a search incident to his arrest, is that there was no proper basis for issuing the arrest warrant in the first place. At no time before or during the trial did the petitioner contend that it was not a valid arrest. There was no objection to the form of the warrant by the defendant, but he apparently contends that the information given to the magistrate, who issued the warrant, could not have been sufficient. The testimony of Agent Owens with regard to his gambling activities with the defendant would be probable cause that the defendant was keeping a room or house with books or papers for the purpose of recording bets. This was the location of the telephone from which the defendant transacted his business. Further, Agent Owens testified as follows:

Tr. p. 10, *f.* 37:

A. I received information that Mr. Porter had gam-

> bling paraphernalia, and parlay cards in his possession at his dwelling home.

It is obvious that the magistrate felt that Agent Owens' personal knowledge and the other information that he had was sufficient to issue the warrant.

Since the defendant made no objection to the warrant until the close of the State's case, there was no opportunity for proving the sufficiency of probable cause, other than from the record. The State feels that the record reveals sufficient information for the issuance of the warrant.

Since the petitioner makes no particular attack upon the State's right to make a lawful search incident to an arrest, it would be futile to attempt to review all of the many State and federal decisions supporting this right of the State. In affirming the decision of the lower Court in this case, the South Carolina Supreme Court covered the basic question in their decision, *State v. Porter,* S. C. ; 162 S.E. 2d 843.

> He contends that, since the officers did not have a search warrant, the articles were obtained as a result of an unlawful search and were inadmissible under the rule announced in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081, 81 S. Ct. 1684.
>
> While the inquiry of the defendant as to a search warrant and his subsequent statement to the officers to go ahead and look around, amply support a finding, as contended by the State, that the defendant thereby consented to the search, we think there is another principle, assuming there was no consent, which makes the exclusionary rule in *Mapp* clearly inapplicable here. It was thus stated in the case of *State v. Swilling,* 249 S. C. 541, 155 S. E. (2d) 607, quoting from 47 Am. Jr., *Searches and Seizures,* Section 19 (Cumulative Supplement):
>
> When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the ac-

cused for weapons or for the fruits of or implements used to commit the crime. The right to search and seize incident to a lawful arrest and without a warrant extends to things under the accused's immediate control and, to an extent depending on the circumstances of the case, to the place where he is arrested.

The articles in question were obtained without a search warrant, but incident to a lawful arrest, from the place where the defendant was arrested and where it was charged that the unlawful gambling activities were carried on. The house was under defendant's control and the search of the residence of defendant was not unlawful so as to make inadmissible the articles so obtained. *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399. There will be found an excellent annotation in 19 A.L.R. (3d) 727, in which recent cases are collected dealing with the validity of nonconsensual searches and seizures conducted without a search warrant following a lawful arrest.

Ker v. California, 374 U. S. 42, 10 L. E. (2) 743, 83 S. Ct. 1643, is among the most recent decisions supporting the position of the State.

II

The Petitioner Was Denied Due Process of Law, Guaranteed by the Fourth and Fourteenth Amendment to the Constitution of the United States, by the Receipt as Evidence of Statements Allegedly Made by the Petitioner at the Time of His Arrest, When It Was Admitted by the State of South Carolina That the Arresting Officers, at no Time, Advised Petitioner of His Right to Remain Silent and/or to Have Present an Attorney Prior to Questioning.

Immediately after having served the defendant with the arrest warrant, Sheriff's Lieutenant Coleman asked the defen-

dant if they could look around his home. His reply was "go ahead" or "help yourself". The State contends that the defendant was thereby consenting to search of his home. Defendant's counsel contend that this statement of the defendant was inadmissible in that it conflicts with the ruling of United States Supreme Court in the case of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2nd 694. First, the Miranda decision does not require that an officer advise the defendant of anything before asking permission to search his premises. The defendant's counsel have read something into this case that simply is not there. This fact has been borne out by several State decisions since the Miranda case was decided (June 13, 1966) and one of these is *People v. Chaddock*, 57 California Reporter 582. The California Court held that:

> There is no requirement in the law that an officer shall first advise a person of his constitutional rights and of his right to refuse to grant a consent to a search before the officer seeks a valid consent from the person to conduct a particular search. The mere asking of permission carries with it the implication that the person can withhold permission for such an entry or search.

This is a very logical statement and is supported by what happened in the instant case. The first thing that the defendant said to the officers was to ask if they had a search warrant (Tr. p. 28, f. 111). This question showed conclusively that the defendant knew that he ordinarily would have the right to refuse a search. Perhaps he was well enough acquainted with the law to know that officers have the right to make a reasonable search incident to an arrest.

III

The Petitioner Was Denied Due Process of Law and Equal Protection of the Law, Guaranteed by the Fourteenth Amendment to the Constitution of the United States by the Failure of the Trial Judge to Charge the Jury the Law Relative to Entrapment, When There Has Been Entrapment of the Petitioner by the Police Officers.

The record in this case does not contain any testimony which would have warranted the Trial Judge in charging the jury the law of entrapment. In his brief, the defendant contends that Agent Owens persuaded the defendant to accept a bet. This is not substantiated by the testimony. In fact, Agent Owens swore that he did not urge the defendant to accept the bet (Tr. p. 17, f. 66). It is only reasonable that the defendant, who did not know Agent Owens, would prefer to call Agent Owens back at an unsuspicious telephone number before engaging in this activity.

In *State v. Jacobs*, 238 S. C. 234, 119 S. E. 2d 735, that Court held that, "Entrapment is the conception and planning of an offense by an officer, and is procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer".

This case is also authority for the fact that merely affording an opportunity for the commission of the offense does not constitute entrapment. Agent Owens only made the initial offer and testimony shows that the defendant set the odds and detailed all arrangements for executing the bets. The Trial Judge properly refused to charge the law of entrapment.

CONCLUSION

All questions presented herein have been previously denied by the United States Supreme Court and the trial was conducted in accordance therewith and the State Appellate Court has already considered these questions, enlightened by the most recent federal decisions. Therefore, the State of South Carolina would respectfully urge that this Petition for a Writ of Certiorari be denied on the grounds as set forth above.

Respectfully submitted,

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